SUPREME COURT, U.S.
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In The
Supreme Court of the United States

JUNE TERM, 1994

MUNICIPAL AND INDUSTRIAL DISPOSAL COMPANY, WILLIAM FIORE, D/B/A Municipal and Industrial Disposal Company,

Petitioner,

v.

CAROL M. BROWNER, in her official capacity as Administrator of the United States Environmental Protection Agency, and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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82 pp

QUESTION PRESENTED FOR REVIEW

A. Does the District Court's error in assessing penalty have any Constitutional merit regarding due process, cruel and unusual punishment and mitigating circumstances as to civil penalties governed by the Environmental Protection Agency, and, will this case establish a dangerous precedent which if not corrected, other lower courts might unwisely choose to adopt this approach and ruin a person's life, employment and happiness without appropriate guidance ?

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amdt. V. provides, in relevant part:

". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law [.]"

U.S. Const. Amdt., VIII. provides, in relevant part:

". . . nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Const., Amdt. XIV. provides, in relevant part:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

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REFERENCE TO OPINIONS BELOW

The decision [JUDGMENT] of the U.S. Court of Appeals for the THIRD Circuit is reproduced in the Appendix at A-28.

The only opinion delivered in this case is the Report of the United States Magistrate Judge Ila Jeanne Sensenich, which was adopted as the opinion of United States District Court Judge Alan N. Bloch and is reproduced in the Appendix beginning at page A-30.

JURISDICTION OF THE COURT

The Opinion of the Court of Appeals for the Third Circuit was filed on January 26, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On February 28, 1985, the Environmental Protection Agency ("EPA") [respondents herein] issues an administrative complaint, order and civil penalty assessment against Municipal & Industrial Disposal Company ("MIDC") and William Fiore, d/b/a, Municipal and Industrial Disposal Company [petitioner herein], pursuant to RESOURCE CONSERVATION & RECOVERY ACT ("RCRA"), Section 3008, 42 U.S.C. §6928. The penalty assessed was in the amount of $25,250.00. That administrative complaint was affirmed by an EPA Administration Law Judge, and a corresponding Order was issues on June 19, 1987. A final decision affirming the same was issued on November 1, 1988.

The EPA also issued a RCRA Section 3013 Order against MIDC on March 11, 1987. That Order required MIDC to submit certain proposals for ground water monitoring and

site investigations to MIDC's hazardous waste facility to implement those proposals once approved.

Thereafter, on November 1, 1988, MIDC filed a complaint in the U.S. District Court (W.D. Pa.) against: William K. Reilly [1] in his official capacity as Administrator of the United States Environmental Protection Agency seeking judicial review of the final decision on the $25,000.00 penalty assessment arising from the Section 3013 Order. In response to MIDC's complaint, the EPA filed an Answer and Counter claim. The counter claim raised for the first time claims for the maximum civil penalties allowed pursuant to RCRA Section 3013: $5,000.00 per day!

On July 27, 1992, the Magistrate Judge's

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[1] Subsequently, Carol M. Browner, became Administrator of the United States Environmental Protection Agency, respondent herein.

Proposed Findings of Fact Conclusions of Law and Recommendation for Disposition was submitted therein recommending as to count one, the Court entered judgment in the amount of $25,000.00; and as to Count three that the Court imposed a penalty of $2,000.00 per day for 240 days for the total penalty of $480,000.00. (A-55).

On August 3, 1992, petitioner caused and filed an Objection to Report and Recommendation of the Magistrate Judge's findings, and objected only to that portion of the Report and Recommendation which recommends imposition of a penalty in the amount of $480,000.00 ($2,000.00 per day for 240 days) as to Count three. Petitioner respectfully submitted to the District Court that a penalty of no more than $1,000.00 per day would be appropriate under the circumstances because it would serve as a deterrent and would sufficiently punish petitioner without being overly punitive.

On August 20, 1992, the District Court, per the Honorable Alan N. Bloch, entered a memorandum adopting the Proposed Findings of Fact, Conclusions of Law and Recommendation for Disposition of Chief Magistrate Judge Sensenich, dated July 24, 1992.

On October 19, 1992, petitioner filed a Notice of Appeal (A-66); petitioner asserted the amount of the penalty claimed under PCRA Section 3031 is the subject of that appeal and the controversy before that Court.

On July 26, 1991, the District Court entered an Order granting the Motion for Summary Judgment filed by Respondents therein adopting the two reports and recommendations of the Magistrate Judge dated November 5, 1990 and June 12, 1991. Petitioner appealed that Order to the Third Circuit Court of Appeals on September 3, 1991 (C.A. No. 91-3590), and on November 25, 1991 that Court (per the Honorable Justice, Edward R. Becker) dismissed the appeal for lack of appellate jurisdiction, i.e.,

dismissed the appeal on motion of the government for lack of a final appealable Order because the District Court had not determined the applicable penalties.

A hearing was held on July 10, 1992, to consider the appropriate penalties. At the hearing, respondents stipulated that the maximum number of days for which petitioner could be liable for non-compliance with the Section 3013 Order was 240 days.

On July 20, 1992, petitioner filed Post-Hearing Brief of MIDC conceding that MIDC no longer contested the facts of that violation on the amount of penalty. And petitioner did not contest the fine of $25,250.00 for the violations of Section 3008 Order (CLAIM TWO), and that the only question was the amount of penalty petitioner should be required to pay for violation of the Section 3013 Order, premised on the undisputed facts respondents stipulated to petitioner's NEGATIVE NET WORTH; petitioner was no longer in business and petitioner had volunteered

to address the site under an EPA Consent Order, a nominal penalty would suffice.

The appeal to the Third Circuit Court of Appeals was whether the District Court imposed an overly punitive amount of penalty for which your petitioner, d/b/a MIDC is liable arising out of its alleged failure to comply with an administrative Order issued by the respondents, pursuant to Section 3013 of the RCRA, 42 U.S.C. §9634.

The proper factors to be considered in assessing the civil penalty are:

1. The good or bad faith of the petitioner ;

2. The injury to the public ;

3. The petitioner's ability to pay ;

4. The desire to eliminate the benefits derived by a violation and ;

5. The necessity of vindicating the authority of the penalizing agency.

As can be easily discernible from the District Court record hearing held on May 5, 1992, before Magistrate Judge Sensenich, the Court nevertheless failed to properly apply

these factors. Initially, there was no injury to the public as the record demonstrates via respondents expert witness, James Webb, Section Chief for the United States EPA in Region III Office, testified. (A-57).

In regards to the bad faith of petitioner, the District Court's record demonstrates the positive. (A-16).

These genuine issues of material fact remain uncontroverted and, unequivocally demonstrate petitioner did make a "good faith" effort to comply with the Consent Order between the respondents, and responsible parties, in the removal action being undertaken. The same record reflects that no one in the world suffered any personal harm or injury; there was no property damage or injury to the public.

Further genuine issues of material fact that remain uncontroverted regarding petitioner's "benefits derived by a violation" is found in the Magistrate

Judge's Report and Recommendation. (A-62).

Further, fact demonstrate petitioner has a NEGATIVE NET WORTH in regard to "ability to pay element" when assessing civil penalty according to respondent's expert witness, Leo J. Mullin, Civil Investigator for the United States Environmental Protection Agency in Region III, Philadelphia, Pennsylvania, who testified at the hearing held on May 7, 1992, to wit:

"BY MR. ROSEN: *(petitioner's Counsel)*

> Q. You give a lot of information, Mr. Mullin. Based on the information you have, you acknowledge that Mr. Fiore has a negative net worth. Forget about ability to pay. He has a negative net worth?"

A. Yes, sir."

(A-61).

REASONS FOR GRANTING THE WRIT

The focal point of the argument sub judice, is couched in petitioner's "ability to pay" the penalty by the lower Court, this is to day, $2,000.00 per day for 240 days. Thus, the issue is narrowed to the question whether the District Court erred when entering judgment by ignoring the evidence of petitioner's ability to pay which resulted in the lower Court being overly punitive premised on the facts stated herein.

Initially there are several statutory schemes providing for the imposition of civil money penalties. Decisions under those provisions are useful guidance tools in assessing the appropriate penalty under a provision given the scarcity of case law involving RCRA penalties. One such alternative statutory scheme is the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9601 et seq.

The most recent decision is found in the U.S. District Court for the E.D. of Pennsylvania, United States v. Barkman, 784 F.Supp. 1181 (E.D. Pa. 1993), therein setting forth the factors to be considered when assessing penalties under CERCLA. The Barkman Court set forth what it held to be the relevant factors in the determination of the assessment of civil penalty, to wit:

1. The good or bad faith of the defendant;
2. The injury to the public;
3. The defendant's ability to pay;
4. The desire to eliminate the benefits derived by a violation;
5. The necessity of vindicating the authority of the penalizing agency.

I. THE GOOD OR BAD FAITH OF THE DEFENDANT.

The uncontroverted facts from the record are at the Magistrate Judge's Proposed Findings of Fact (A-30, Id., @ pg. 12), and, outlines petitioner's unsuccessful efforts to comply with the EPA March 11, 1987 Order which follows:

"However, Mr. Webb admitted that Mr. Fiore is participating in the removal required by that order and that he has not failed to comply with that order."
(A-41).

The Magistrate Judge further observed that petitioner continued unsuccessfully to comply with the Order. There is no evidence that petitioner's unsuccessful efforts to comply with the Order constituted an act of bad faith. The same as there is no evidence that petitioner's unsuccessful efforts to frustrate or prevent the respondent's from undertaking the study itself, or, using the Superfund resources to perform the study. This represents a due process issue as noted in United States v. Lovasco, 431 U.S. 783, 795-96 (1977). Conversely, respondents admitted during cross-examination that petitioner and others had entered into a Consent Order directly with the EPA to study, investigate and remediate all of the hazardous wast faciltiy. (A-55).

However, what the lower Court failed to consider and/or address is the facts what the cleanup at the waste storage entails which is as follows:

Rainwater that entered the storage pit became contaminated when it came in contact with hazardous waste in the storage pit. The cleanup the respondents keep describing is not the cleanup of the hazardous waste stored, but the rainwater that accumulated in the pit over a period of time. This is the type of cleanup that respondents was required to perform and, agreed upon in the Consent Decree between petitioner and respondents.

In March 1983, petitioner made application with the DER of Pennsylvania for a water discharge permit to treat and discharge treated waste water. The DER response to this application petitioner received in December 1983, stating that the limits of pollutants permitted to be discharged was one part *curmone*, which

was ridiculous and made a mockery of petitioner's application for the water discharge permit. Thus, petitioner had no way to treat and discharge waste water with the unreasonable limit placed upon him.

Subsequently, in January 1984, petitioner filed an appeal with the EPA Hearing Board of Pennsylvania, requesting that they afford petitioner the same standards and limits that is issued to the EPA. To this date, petitioner is still on appeal before the Commonwealth Court of Pennsylvania. Thus, petitioner had no way to treat and discharge waste water with the limits placed upon which precluded from ever cleaning up the contaminated rainwater at the site. In short, petitioner was caught in a CATCH-22 situation which contributed to petitioner's "good faith" efforts to participate with the responsible parties in the Consent Order in the removal action being undertaken, to no avil.

From the foregoing it is apparent that

petitioner did not frustrate or prevent respondents from undertaking or remediating the study. At worst, petitioner's unsuccessful efforts were positive and certainly not, in bad faith; that, petitioner effectively purged himself of any bad faith (which it denies) and rehabilitated itself by voluntarily entering into the Consent Order with EPA to remediate the hazardous waste sections of its facility..

II. THE INJURY TO THE PUBLIC

Regarding the injury to the public are the uncontroverted facts from the record. (A-57, Id., @ 33). Which remains undisputed by respondents that they know of no one in the whole world that complained of being harmed as a result of hazardous waste disposed of at the MIDC facility. Cf., Barker, supra. (injury to the public is one element of a civil penalty consideration for violation of the CERCLA 42 U.S.C. §9601 et seq.) The penalty scheme under CERCLA is

similar to the RCRA penalty scheme. In this case, petitioner adduced no evidence of actual harm or any injury to the public.

III. THE DEFENDANT'S INABILITY TO PAY

The polestar issue however is petitioner's "inability to pay" a penalty of: $480,000.00, which case law has identified as an element in, penalty cases, of this nature.

Thus, the District Court further erred in law and abused its discretion because the weight of evidence that was introduced at the hearing on August 9, 1992 shows that the petitioner is unable to pay a penalty of $480,000.00, and as a result, imposition of a penalty in the amount of $480,000.00 would be overly punitive in derogation of relevant case law and, would be equal to cruel and unusual punishment. Accord, Louisiana ex rel Francis v. Resweber, 329 U.S. 459, 91 L.Ed. 422, 67 S.Ct. 374 (1947).

Continuing on, the District Court abused

its discretion by giving undue weight to petitioner's unsatisfactory efforts to comply with EPA's March 11, 1987 Order. Consequently, rather than credit petitioner with good faith, or treating petitioner's failed efforts at compliance as, even neutral, at the least; the District Court increased the amount of the penalty thereby penalizing petitioner's from undertaking remedial measures itself. Case law does not support increasing a person's penalty due to failure to comply. And, although the lower Court emphasized the potential harm to the, environment, as a result of petitioner's non-compliance with the Order.

And, as respondents readily admitted that the EPA had not received a single complaint (in the entire World, if not the State of Pennsylvania) . . ., or, determined the existence of injury, damage, or to persons or property that allegedly stemed from your petitioner's facility.

What is conclusive evidence, of

petitioner's NEGATIVE NET WORTH is found at Appendix A-61 , which, remains undisputed, uncontroverted evidence that petitioner's lack of ability to pay -- whom, is now further in debt in the year of 1994..

IV. THE DESIRE TO ELIMINATE THE BENEFITS DERIVED BY A VIOLATION: AND,

On this issue, we have the uncontroverted testimony of EPA's investigator, Leo Mullin, that by not complying with EPA's Section 3013 Order "...Fiore had reaped an economic benefit of $212,000.00. (A-62).

Notwithstanding, petitioner's NEGATIVE NET WORTH (which remains undisputed), this issue layed the foundation for the lower Court to impose sanctions more than doubled the alleged benefits, derived from the so-called violations; sans, touching upon the civil and criminal cost for investigators, research, lawyers, the Fiore family name, the ostracism, the incarceration for the past decade. And the reason your petitioner is proceeding pro se in this Honorable Court.

V. THE NECESSITY OF VINDICATING THE AUTHORITY OF THE PENALIZING AGENCY

The double jeopardy, United States v. Serfass, 450 U.S. 377 (1975), of civil and criminal prosecution, the loss of petitioner's final years of his life jailed, the loss of the family fortune, the shame of being an alleged malefactor, the lack of influence in terms of his grandchildren's and great grandchildren's educational needs, and finally, the layoff of hundres of people who depended on petitioner's employment for decades is more than any amount of of penalization or vindication the DER will ever need for the deteriorating life, soul and spirit of petitioner. This prosecution was vindictive. Accord, United States v. Goodwin, 457 U.S. 368.

The five prong factor set forth in the Barkman, supra, case, for assessment of civil penalties has been addressed by petitioner candidly, leaving no other conclusion for this Honorable Court to stay the sanction for the above reasons and

reverse the District Court's Order imposing the $480,000.00 penalty of MIDC for waste disposal problem.

Pursuant to RCRA §3008(g), the maximum penalty held liable was $25,000.00 for each violation. Cf., United States v. T & S Brass & Bronze Works, Ind., 681 F.Supp. 314 (D.S.C. 1988). Under these provisions, each day that a violation existed is considered to be a separate violation. The court took this opportunity to discuss its role in the assessment process,, maintaining that:

> "Assessment of the amount of a civil penalty is committed to the informed discretion of the court. In exercising this discretion, the court should give effect to the major purpose of a civil penalty: deterrence."

Id., T & S Brass, super, @ 322.

In furtherence, the Court was quick to point out that:

"The statute does not contain any guidance for the court in determining penalties in a judicial proceeding."

* * *

RCRA requires the administrator to take into account the seriousness of the violation and

any **good faith** efforts to comply with applicable requirements. In the absence of other statutory guidance, the court may give consideration to these same factors in determining an appropriate penalty.

Idib., T & S Brass, supra. *(emphasis supplied)*

With these factors in mind, the Court in T & S Brass, supra, where, the defendant failed to exercise any "good faith" effort to comply with the financial responsibility requirements of RCRA.

Notwithstanding the Court (T & S Brass) did acknowledge the fact that the defendant made subsequent remedial modifications to its facility at considerable cost. Without further discussion in its opinion, the T & S Brass court determined that: "...based on the specific circumstances of (this) case, a penalty of, $1,000.00 per day was appropriate [.]" The number of days during which the defendant was in violation of RCRA totaled 194, thus, the defendant was ordered to pay a civil penalty of $194,000.00. Judicial notice should be taken here that this $1,000.00 per day penalty is a mere --

1/25th or, 4% of the maximum allowable penalty of $25,000.00 per day.

Interestingly, in the case sub judice, petitioner was denied a water permit to comply with RCRA violations causing the failure to come into compliance with respondent's RCRA Section 3013 Order. However, financially the District Court recognized "Mr. Fiore is participating in the removal of the hazardous waste as required by the Consent Order." (A-47). This conclusion avered by the Magistrate Judge's Proposed Findings of Fact, demonstrates a viable "good faith" effort on patitioner's part (an element absent in T & S Brass).

Moreover, the lower Court refused to acknowledge that petitioner hired a company that is, an environmental consulting firm (recognized and utilized by the U.S. EPA), NUS Corporation, that submitted the MIDC permit application to the DER for the hazardous waste disposal facility (at petitioner's cost of $319,000.00). (A-64).

Petitioner submits, if this proof positive of petitioner's good faith effort, coupled with, the Magistrate Judge's findings that petitioner "...is participating in the removal of the hazardous waste as required by the Consent Order", to the quick begs the question: Can there be any good faith effort, made possible ?

A subsequent case making heavy reference to the U.S. District Court ruling in T & S BSrass is found in U.S.E.P.A. v. Environmental Waste Control, Ind., 710 F.Supp. 1172 (N.D. Ind. 1989) *affirmed*, 917 F.2d 327 (7th Cir. 1990) ["EWC"], the EPA and a private citizens group brought an action against the owners and operators of a hazardous waste disposal site for various violations of RCRA including a loss of interim status, failure to satisfy minimum technology requirements, and failure to adequately monitor ground water. Again, one of the defenses submitted by the defendant was that there was a "good faith" effort on

its part to obtain adequate insurance in order to be in compliance with the provisions after the deadline. The Court addressed this argument for the purposes of liability, rejected the argument and maintained that the good faith efforts are not relevant to determining whether the defendant complied with the regulations. However, in its dictum, the Court did recognize that:

> "Good faith efforts to obtain insurance are clearly admissible with respect to the appropriate civil penalty and possibly with respect to the scope of injunctive relief sought."

Id., EWC Inc., @ 1212, *citing*, United States v. Allegan Metal-Finishing Company, 696 F.Supp. 275, 291 (W.D. Mich. 1988).

The Court in EWC, Inc., supra, in its discussion regarding the assessment of penalties, took into consideration the defendant's "good faith" effort in obtaining adequate insurance in the eyes of the state regulatory agency. However, the Court also considered the good faith effort of the defendant to install the requisite

monitoring system and found that no such good faith was ever exercised. The Court went on to hold that the defendant could not claim the benefit of its good faith on the one issue when it did not act in good faith on the other. EWC, Inc., @ 1241.

The Court in EWC, Inc., did acknowledge the existence of the $25,000 per day maximum penalty. The Court also considered the EPA's argument that the Court ought to presume the appropriateness of the maximum penalty, which penalty was to be assessed downward only if mitigating circumstances existed. However, the Court rejected the EPA's argument regarding the Court's inability to mitigate the penalty downward. Rather, the Court noted, as did the Court in T & S Brass, supra, that the guidelines for assessing penalties were for the administrative agency only, and that "the EPA may not impinge upon the discretion Congress has afforded the Courts." Id., @ 1242.

The Court relied on the passage from the t 7 s Brass, supra, opinion which discussed the two elements relevant to the assessment of (1) the seriousness of the violation; and (2) the good faith efforts of the defendant to comply with the requirements. The EWC, Inc., Court went on to hold:

> A civil penalty must provide a meaningful deterrence without being overly punitive; it should be large enough to hurt; it should deter anyone in the future from showing a similar lack of concern with compliance."

Id., @ 1244, *citing*, United States v. Phelps Dodge-Industries, Inc., 589 F. Supp. 1340, 1376 (S.D.N.Y. 1984).

CONCLUSION

This case presents important Constitutional issues regarding due process, cruel and unusual punishment as to civil penalties governed by the EPA. This case has established a dangerous precedent which if not clarified, other lower Courts may unwisely choose to adopt and ruin a persons' life, employment and happiness sans appropriate guidance.

The importance of the Constitutional issues presented, coupled with the fact that petitioner was treated unfairly at every stage of the proceedings, warrants the granting of certiorari.

Respectfully submitted,

William M. Fiore

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P.O. Box 99901
Pittsburgh, PA 15233

Dated: May 16, 1994.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-3636

MUNICIPAL & INDUSTRIAL DISPOSAL COMPANY

V.

CAROL M. BROWNER,* in his official capacity as Administrator of the United States Environmental Protection Agency, and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

MUNICIPAL AND INDUSTRIAL DISPOSAL COMPANY, WILLIAM FIORE, D/B/A Municipal and Industrial Disposal Company,*

Appellants

*(Pursuant to Rule 12(a), F.R.A.P.)

*(Pursuant to Rule 43(c), F.R.A.P.)

ON APPEAL FROM THE UNITED STATES DISTRICT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 88-02631)
District Judge: Hon. Alan N. Bloch

Before: BECKER and NYGAARD, Circuit Judges, and YOHN, District Judge*

JUDGMENT

---

* Honorable William H. Yohn, Jr., United States District Judge for the E.D. of PA, sitting by designation.

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted under Third Circuit LAR 34.1(a) on December 9, 1993.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court entered August 21, 1992 be, and the same is hereby affirmed.

Costs taxed against appellant.

ATTEST:

/S/ P. Douglas Sisk

Clerk

DATED: DEC 20 1993

Certified as a true copy and issued in lieu of a formal mandate on January 26, 1994.

Teste: /s/ P. Douglas Sisk

Clerk, U.S. Court of Appeals for the Third Circuit.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MUNICIPAL & INDUSTRIAL DISPOSAL COMPANY, Plaintiff	)	
vs.	)	Civil Action No. 88-2631
WILLIAM K. REILLY, in his official capacity as Administrator of the United States Environmental Protect-ION Agency, and the UNITED STATES ENVIRON-MENTAL AGENCY, Defendants	)	Judge Alan N. Bloch / Magistrate Judge Sensenich
THE UNITED STATES OF AMERICA, Counterclaim Plaintiff	)	
vs.	)	
WILLIAM FIORE, d/b/a Municipal & Industrial Disposal Company, Counterclaim Defendant	)	

MAGISTRATE JUDGE'S PROPOSED FINDINGS OF FACT CONCLUSIONS OF LAW AND RECOMMENDATION FOR DISPOSITION

I. RECOMMENDATION

It is recommended that as to count one, the court not impose any penalty; as to count two, the court enter judgment in the

amount of $25,250.00; and as to count three that the court impose a penalty of $2,000.00 per day for 240 days for a total penalty of $480,000.00.

II. REPORT

On July 26, 1991, the court entered an order granting the motion for summary judgment filed by William K. Reilly, in his official capacity as administrator of the United States Environmental Protection Agency, and the United States Environmental Protection Agency, (EPA) as defendants and counterclaim plaintiff and adopted the two reports and recommendations of this magistrate judge dated November 5, 1990 and June 12, 1991. Plaintiff appealed to the Court of Appeals which dismissed the appeal on motion of the government for lack of a final appeable order because this court had not determined the applicable penalties. A hearing was held on July 10, 1992 to consider the appropriate penalties.

In the first claim of its counterclaim, the government sought a civil penalty of $25,000.00 per day for each day that Municipal & Industrial DisposalCompany (MIDC) failed to pay the administrative penalties of $25,000.00. However, in its motion to dismiss the appeal for lack of appellate jurisdiction, the government noted that it was willing to forgo collection of the statutory penalties for its first claim. As to its second claim, it was seeking payment of the administratively imposed penalties of $25,000.00 plus interest. As to its third claim, which was based on MIDC's failure to obey the EPA's 3013 ORDER OF March 11, 1987, the government sought a penalty of $5,000.00 per day from April 14, 1987, until December 14, 1987, when the EPA notified MIDC that its compliance was no longer expected.

During oral argument, counsel for counterclaim defendant stated that he did not dispute the fact that the order of March

11, 1987 was entered; that he did not comply; and that the only question was the amount of penalty he should be required to pay for violation of the Section 3013 order. He also agreed that counterclaim defendant did not contest the fine of $25,000.00 for violation of the Section 3008 order (claim two).[1] Since the government has not addressed the question of interest on the second claim, either during the hearing or it its memorandum, it is assumed that it is now seeking only a fine of $25,000.00 together with the penalty of $5,000.00 per day for 240 days.

A. Proposed Findings of Fact

1. Government Exhibit 3 is a copy of the Section 3013 order entered by the United States Environmental Protection Agency, Region III, on March 11, 1987. The order found that MIDC has not installed

[1] MIDC's Post hearing Brief, page 2, also asserts that it no longer contests this violation or the penalty.

groundwater monitoring wells capable of detecting significant increases in contamination in groundwater, had not sampled and analyzed groundwater for all of the required parameters and therefore had not implemented a groundwater monitoring program which satisfied the requirements of 25 Pa. Code Section 75.265. A review of the data submitted by MIDC has showed the presence of hazardous waste constituents in the groundwater around the surface impoundments and in the leachate collection system. These included benzene, which can be acutely toxic to aquatic organisms, leukemogenic in humans, and carcinogenic in animals; naphthalene which can result in changes to blood chemistry, including anemia; lead which can adversely affect development of the nervous system in young children and result in neurobiological defects such as learning disabilities and behavioral problems, stillbirths and miscarriages; and cadmium, a known animal

carcinogen and a suspected human carcinogen which can adversely affect the kidneys, bones, liver, reproductive system, respiratory tract and immune system.

2. The Section 3013 order found it was likely that the groundwater in the unconsolidated alluvial aquifer under MIDC's facility discharged to the Youghiogheny River which was located approximately 1,500 feet from its surface impoundments. The town of McKeesport, Pennsylvania, obtains its municipal water supply from the Youghiogheny River via a water intake located eight miles downstream from MIDC's surface impoundments.

The order found that;

a. Hazardous wastes are present and have been treated, stored, and/or disposed of at the Respondent's facility.

b. Hazardous wastes have been released from the facility.

c. The hazardous wastes at and/or released from the facility may present a substantial hazard to human

health and/or the environment.

3. the order required MIDC to submit to the EPA within thirty days a detailed written proposal for the sampling, analysis, monitoring and reporting of the hazardous wastes and hazardous waste constituents that were present at, or that may have been released from, MIDC's facility, and to implement such written proposal once it was approved by the EPA. The order specified the detailed elements to be contained in the proposal and specifically provided that the holding of a conference or the submission of written comments would not vary or extend the thirty day time period required for submission of the proposal.

4. The order also advised MIDC that if it failed or refused to comply, EPA may commence a civil action to require compliance and to assess a civil penalty of not more than $5,000.00 for each day during which such failure or refusal occurred.

5. The order was sent to

counterclaim defendant, William Fiore, by certified mail on March 11, 1987. The accompanying letter advised him that he could confer with Mr. James Webb prior to submission of MIDC's proposal (Exhibit 4).

6. On March 21, 1987, Mr. Fiore called Mr. Webb, complained about the order, and asked for sampling information which Mr. Webb sent to him on April 2, 1987.

7. On April 9, 1987, Mr. Fiore wrote a letter to Mr. Webb enclosing a copy of an inspection of the MIDC facility which had been conducted by the Pennsylvania Department of Environmental Resources (DER) on March 30, 1987. Mr. Fiore commented that there ware no pollution violations listed on the report. (Exhibit 5). Mr. Webb was not satisfied with the DER report because no sampling of groundwater had been conducted at the facility for over three years. On April 24, 1987, he contacted attorney Robert Ging who had represented Mr. Fiore in the past. He leared that Mr. Ging was no longer

representing him. He also learned that Mr. Fiore had been incarcerated.

8. On May 29, 1987, Mr. Webb had a telephone conversation with James Kilburg, of Murray Associates, a consultant to Mr. Fiore, who told him he was sending a letter report or proposal. Mr. Webb subsequently received the report, Exhibit 6. The report did not provide any new information. It did not provide any information about the surface water, soil, or groundwater sampling.

9. On June 30, 1987, Mr. Webb called Murray Associates and told Mr. Kilburg that the report was not adequate and would have to be radically upgraded.

10. On August 7, 1987, Mr. Webb sent Mr. Fiore a letter telling him he had reviewed the May 29, 1987 proposal prepared by Murray Associates and that id did not adequately address most of the requirements outlined in the order. It was unacceptable and would have to be radically upgraded to carry out the requirements of the order.

11. In September 1987 Mr. Webb received a letter from Mr. Kilburg advising that Murray Associates, Inc. was preparing plans to investigate Mr. Fiore's site and asked for the locations of the surface points the EPA had sampled during its evaluation of the site. Mr. Webb sent the sampling data on September 11, 1987, but never heard back from Mr. Kilburg. (Exhibit 9).

12. In October 1987 Mr. Webb had a telephone conversation with Mr. Fiore i which Mr. Fiore asked for sampling data from the EPA study. Mr. Webb sent it to him. (Exhibit 10). Mr. Webb requested a written reply from Mr. Fiore within seven days of receipt of the letter, outlining his intent to comply with the order. He was advised that a proposed plan of action must be submitted by his consultant within fifteen days.

13. Mr. Webb subsequently received a letter from Mr. Gregg Rosen, Mr. Fiore's

attorney, asking for additional information. On December 14, 1987, Mr. Webb wrote a letter to Mr. Rosen advising him that since Mr. Fiore had not initiated the ordered investigation, the EPA would no longer look to him to perform the study. Instead, the EPA would either undertake the study itself or use Superfund resources to perform the study. It reserved its right to take enforcement action pursuant to Section 3013(e) of RCRA, 42 U.S.C. §6934(e). (Exhibit 11).

14. On January 25, 1983, Mr. Fiore signed a consent order and agreement on behalf of MIDC with Charles A. Duritsa, Regional Solid Waste Manager and Howard J. Wein, Assistant Counsel of the DER which stated that inspections of MIDC's facility revealed pollutants and contaminants which discharged to a tributary of the Youghiogheny River and which constituted a violation of Pennsylvania law. (Exhibit 12). It was further admitted that MIDC had failed

to remove all waste stored in the temporary waste pit as required by letters dated May 4, 1981, July 31, 1981 and November 5, 1982. This also constituted a violation of Pennsylvania law. In the agreement, Mr. Fiore agreed to submit to the Department a fully completed application, acceptable to the Department, for a permit for collection and treatment of all discharges to the waters of the Commonwealth, to the standards required by the Clean Streams Law, the Federal Clean Water Act, and all regulations.

15. The consent order required MIDC to submit an application for an industrial waste discharge permit by March 1, 1983, including a complete chemical analysis of the waste waters to be discharged and all other information required by law. (Exhibit 12).

16. Mr. Fiore is participating in the removal of the hazardous wastes as required by the consent order.

17. Mr. Fiore has been convicted of a violation of the Solid Waste Management Act and also of conspiracy to murder Mr. Duritsa.

18. Contamination of groundwater can spread rapidly to rivers and wells which are used for drinking water.

19. Mr. John Nevius has estimated the cost of cleaning up MIDC's facility to be approximately $163,400.00, without including the costs of collecting and analysis of soil, surface water and sediment.

20. Leo J. Mullen, a civil investigator for the EPA in Region 3, Philadelphia, a qualified real estate appraiser, has, with the limited information available to him, appraised Mr. Fiore's unencumbered assets, consisting of real property and bank accounts, at $1,884,878.00, and his encumbered assets at $1,718,000.00. (Exhibit 13). Mr. Fiore has not offered any contradictory evidence. It was the opinion of Mr. Mullen

that Mr. Fiore could pay a penalty of at least $800,000.00 without severe economic hardship.

21. The government offered evidence that Mr. Fiore has as many as 108 vehicles registered in his name with the Pennsylvania Department of Motor vehicles. There is no way to determine the age or condition of the vehicles. (Exhibit 15). However, Exhibit 16 reveals that Mr. Fiore has a 1979 Lincoln with a vehicle expiration date of April 1993, and a 1978 Lincoln with a vehicle expiration date of august 193. Thee are no encumbrances on the vehicles.

22. Mr. Mullen's review of Mr. Fiore's financial records for 1991 revealed a bank deposit of $54,000.00 identified as "personal monies" from no known source. (Exhibit F, p.8).

23. On June 29, 1992, the Township of Elizabeth filed a municipal claim against Mr. Fiore, t/d/b/a Municipal and Industrial Disposal Company, in the amount of $1,539,360.00 in the Court of Common Pleas

of Allegheny County for unpaid gross receipts taxes on operators of landfills within the township. (Exhibit D).

24. Mr. Fiore's 1991 income tax return listed real estate taxes of $104,274.50. Mr. Mullen testified that the real estate he had located could account for only $37,000.00--$38,000.00 in real estate taxes and the government believed Mr. Fiore may have real estate which has not yet been identified.

25. On November 26, 1990 the Commonwealth of Pennsylvania Department of Revenue filed a lien in the amount of $1,688,164.46 against Fiore Trucking & Contracting in the office of the prothonotary of Allegheny County. (Exhibit C).

26. On February 6, 1981, the Commonwealth of Pennsylvania Department of Revenue filed a lien in the amount of $292,419.24 against Mr. Fiore in the office of the prothonotary of Allegheny County. (Exhibit A).

27. On May 7, 1986, the Pennsylvania Department of Revenue filed a lien in the amount of $854,260.98 against Mr. Fiore in the office of the prothonotary of Allegheny County. (Exhibit B).

B. Discussion

The government argues that in determining the penalty to be imposed on Mr. Fiore, the court should start with the maximum penalty of $5,000.00 per day for a total of 240 days or a total of $1,200,000.00 for his noncompliance from April 14, 1987 until December 14, 1987. However, the case it cites, Cheasapeake Bay Found. v. Gwaltney of Smithfield, 791 F.2d 304 (4th Cir. 1986), was a citizen's suit under the Clean Water Act, 33 U.S.C. §1365. The government has not cited any cases holding that in determining a civil penalty under Section 3013(e), 42 U.S.C. §6934(e), the court is to start with the maximum penalty and place upon the defendant the burden of reducing it. The courts generally

seem to hold that the assessment of a civil penalty is committed to the sound discretion of the court. U.S. EPA v. Environmental Waste Control, Inc., 710 F.Supp. 1172, 1242 (M.D. Ind. 1989); U.S. v. T & S Brass and Bronze Works, Inc., 681 F.Supp. 314 (D.S.C. 1988), p. 322; U.S. v. Vineland Chemical Co., 31 ERC 1720, 1727. Further, a penalty should provide a meaningful deterrent and should be large enough to hurt but should not be overly punitive. It should deter anyone in the future from showing a similar lack of concern with compliance. Vineland, supra, at 1728. In U.S. EPA v. Environmental Waste Control, SInc., supra at 1242, the court held that consideration should be given to the seriousness of the violation and any good faith efforts to comply with applicable requirements. See also, U.S. v. T & S Brass and Bronze Works, Inc., supra, at 322. The defendant's ability to pay is also relevant. Vineland, supra, at 1729. The violations, which counterclaim defendant

admits, are serious. Defendant was notified that the groundwater in his facility contained hazardous waste constituents and that the groundwater under his facility discharged to the Youghiogheny River from which the town of McKeesport obtained its municipal water supply approximately eight miles downstream. The record indicates that although he was advised he had thirty days to submit a detailed written proposal, he responded by continually asking for more information. There is no evidence that he took any good faith effort to provide a sufficient written proplosal. The contacts on his behalf by Murray Associates appear to have been merely efforts to buy more time. On the other hand, evidence was admitted that by April 24, 1987, a little more than a month after the order was entered, Mr. Fiore was incarcerated. Although his incarceration could have limited his ability to respond to the order, he and Murray Associates continued to confer with Mr. Webb,

indicating an intention to comply with the order, thereby preventing the EPA from either undertaking the study itself or using Superfund resources to perform the study. Counterclaim defendant has offered no evidence that he was financially unable to comply with the order during the time in question. Although he is no longer in business, the record does not reveal when his business terminated.

The government offered into evidence the consent order Mr. Fiore entered into with the DER on January 25, 1983, apparently as evidence of his lack of good faith. However, Mr. Webb admitted that Mr. Fiore is participating in the removal required by that order and that he has not failed to comply with that order.

Determination of Mr. Fiore's ability to pay is extremely difficult. The government offered some limited evidence that he may have assets the government has not yet located. His financial records for

1991 revealed a bank deposit of $54,000.00 identified as "personal monies" from no known source and his income tax return for 1991 listed real estate taxes of $104,274.50, although Mr. Mullen testified that the real estate he had located could account for only $37,000.00 to $38,000.00 in real estate taxes. Mr. Mullen admitted that he could not do a definitive appraisal of real property without complete information and without reviewing the interior of the premises. However, his appraisals were based upon the information he was able to obtain and Mr. Fiore did not offer any contrary evidence. Therefore, Mr. Mullen's appraisal of Mr. Fiore's real property is accepted and it appears that he has unencumbered assets valued at $1,884,878.00. He also has substantial debts. The liens against him, represented by Exhibits A, B, C, and D, total- - - -$4,374,204.68. After considering all of the factors, it appears that a penalty of $2,000.00 per day for a total of

$480,000.00 would be sufficiently punitive without being excessive. Therefore, it is recommended that as to count three of the counterclaim, a penalty be imposed in the amount of $2,000.00 per day for 240 days or a total of $480,000.00.

C. Proposed Conclusions of Law

1. Section 3013 of RCRA, 42 U.S.C. Section 6934(e) provides:

> The administrator may commence a civil action against any person who fails or refuses to comply with any order issued under this section . . . Such court shall have jurisdiction to require compliance with such order and to assess a civil penalty of not to exceed $5,000.00 for each day during which such failure or refusal occurs.

2. William Fiore is liable for violating Section 3013 for 240 days because he failed to provide a plan within thirty days of the 3013 order issued by James M. Seif on March 11, 1987.

3. A penalty of $2,000.00 per day for a total of 240 days will punish Mr. Fiore and deter others from failing to

comply with orders under Section 3013 and represents a penalty Mr. Fiore can pay.

In accordance with the Magistrates Act, 28 U.S.C. Section 636(b)(1)(B) and (C), and Rule 4 of the Local Rules for MSagistrates, the parties are allowed ten (10) days from the date of service to file objections to this report and recommendation.

ILA JEANNE SENSENICH
Chief U.S. Magistrate Judge

Dated: July 24, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MUNICIPAL & INDUSTRIAL DISPOSAL COMPANY, Plaintiff	)	
vs.	)	Civil Action No. 88-2631
WILLIAM K. REILLY, in his official capacity as Administrator of the United States Environmental Protection Agency, and the UNITED STATES ENVIRONMENTAL AGENCY, Defendants	)	Judge Alan N. Bloch / Magistrate Judge Sensenich
THE UNITED STATES OF AMERICA, Counterclaim Plaintiff	)	
vs.	)	
WILLIAM FIORE, d/b/a Municipal & Industrial Disposal Company, Counterclaim Defendant	)	

MEMORANDUM ORDER

On December 8, 1988, this case was referred to Chief United States Magistrate Judge Ila Jeanne Sensenich for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. Section

636 (b)(1)(A) and (B), and Rules 3 and 4 of the Local Rules for Magistrates.

On July 26, 1991, the court entered an order granting the motion for summary judgment filed by William K. Reilly, in his official capacity as administrator of the Untied States Environmental Protection agency, and the United States Environmental Protection Agency (EPA) as defendants and counterclaim plaintiff and adopted the two reports and recommendations of this magistrate judge dated November 5, 1990, and June 12, 1991. Plaintiff appealed to the Court of Appeals which dismissed the appeal on motion of the government for lack of a final appealable order because this court had not determined the applicable penalties. A hearing was held on July 10, 1992 to consider the appropriate penalites.

The Magistrate judge's proposed findings of fact, conclusions of law and recommendation for disposition, filed on July 24, 1992, recommended that as to count

one, the court not impose any penalty; as to count two, the court enter judgment in the amount of $25,250.00; and as to count three that the court impose a penalty of $2,000.00 per day for 240 days for a total penalty of $480,000.00. The parties were allowed ten (10) days from the date of service to file objections. Service was made on all parties and objections were filed by plaintiff Municipal & Industrial Disposal Company on August 3, 1992. After de novo review of the pleadings and documents in the case, together with the proposed findings of fact, conclusions of law and recommendation for disposition, and objections thereto, the following order is entered:

AND NOW, this 20th day of AUGUST, 1992:

IT IS HEREBY ORDERED that as to count one no penalty is imposed.

IT IS FURTHER ORDERED that as to count two, judgment be entered in the amount of $25,250.00 against William Fiore, d/b/a Municipal and Industrial Disposal Company.

IT IS FURTHER ORDERED that as to count three a penalty of $2,000.00 per day for 240 days for a total penalty of $480,000.00 is imposed against William Fiore, d/b/a Municipal and Industrial Disposal Company.

The proposed findings of fact, conclusions of law and recommendation for disposition of Chief Magistrate Judge Sensenich, dated July 24, 1992, is adopted as the opinion of the court.

ALAN N. BLOCH
United States District Judge

demolition landfill and some drainage ditches beyond the hazardous waste units themselves.

Q. I see. Would the removal action address all the hazardous waste that was intended to be addressed as part of Section 3013 order?

A. It would address the hazardous waste units.

Q. And you indicated Mr. -- strike that. This removal action is being undertaken pursuant to a signed consent order between the EPA and responsible parties, is it not?

A. Yes.

Q. You have seen a copy of that order, haven't you?

A. Yes.

Q. Isn't Mr. Fiore and Municipal & Industrial Disposal Company one of the parties that signed the consent order?

A. Yes.

Q. And so Mr. Fiore is participating with other responsible parties in the removal

action that we have just been discussing?

A. Yes.

Q. Has, to your knowledge Mr. Webb, the removal action complied with the terms of the consent order between EPA and the potentially responsible parties?

A. To my knowledge, yes.

Q. No noncompliance by Mr. fiore or any other responsible parties to the consent order?

A. NO.

MR. ROSEN: I am asking him if he has knowledge, Your Honor, trying to make sure I get broad enough question so his answer is meaningful.

THE COURT: Well, since it is whether he knows, overrule the objection.

BY MR. ROSEN:

Q. Do you know of a single person, Mr. Webb, in the whole world whoever complained of being harmed as a result of a hazardous waste disposed of at MIDC facility?

A. No, I did do not.

Q. Other than -- I don't mean to trivialize this. Other than EPA or Pennsylvania Department of Environmental Resources, has anyone to your knowledge complained baout damage or harm from the hazardous wastes disposed of at the MIDC facility?

A. NO.

Q. You are not familiar with complaint by either personal injury or porperty damage?

MR. HARRELL: Objection, already

asked and answered.

BY MR. ROSEN:

Q. Property damage Mr. Webb, are you familiar with any complaints about property damage from any of the hazardous wastes disposed of at the MIDC facility?

A. No, I am not.

EXHIBIT "F"

WILLIAM FIORE

ASSET ANALYSIS

Property	Assessed Value	Encumbered
William Fiore (Real Property, Florida)		
Boca Raton	$1,700,000	NO
William Fiore (Real Property, Allegheny County)		
Route 51, Ponderosa	$376,000	YES
CRA, Clairton, PA	$216,000	YES
Residence	$150,000	YES
Rolling Hills Village	?	YES
Diamond Land Company (100% Owned by William Fiore)		
Homestead Garage	$168,000	NO
Route 51, Buckeye Barns	$776,000	YES
Certificates of Deposit	$200,000	YES
Other Bank Accounts	$ 16,878	NO
Vehicles & Trailers	?	NO
Value of Encumbered Assets	**$1,718,000**	
Value of Unencumbered Assets	**$1,884,878**	
Total Value of All Assets	**$3,602,878**	

Q. What have they told you?

A. They told me that right now they are going to have, my response is coming from two sources. One, discussions with people from the Department of Revenue and an attorney with the State Attorney General's office and also my experience when I was working for the Internal revenue which allowed me to become familiar with the collection procedures of the Pennsylvania Department of Revenue.

And what my opinion is based on is that experience and the information provided is that Pennsylvania will file the liens -- Allegheny County and if they are not able to resolve it, will begin to execute on all property with the exception of Mr. Fiore's residence, that they are not proceeding against the properties under the name Diamond Land and Development Company and that they will not proceed against assets outside of the State of Pennsylvania which

in this particular case means they will not proceed against the Boca Raton property.

Q. You give me a lot of information, Mr. Mullin. Based on the information you have, you acknowledge that Mr. Fiore has a negative net worth. Forget about ability to pay. He has a negative net worth?

A. Yes, sir.

Q. Now under your ability to pay analysis, if the EPA forced sold the unencumbered property, paid the expenses of

by means of imposing meaningful penalties. this can be accomplished by depriving violators, such as Fiore, of the benefits of their violations. In this case, the uncontradicted testimony of EPA's investigator, Leo Mullin, was that by not complying with EPA's Section 3013 order Fiore had reaped an economic benefit of $212,000. The fine imposed here deprives appellant of this benefit.

5. EPA's authority to enforce the environmental laws must be vindicated. -- The court, in United States v. Charles George Trucking Co., 823 F.2d 685, 689 (1st Cir. 1987), recognized the importance of EPA's power to impose civil penalties as a means of enforcing the agency's information gathering authority so that it could effectively regulate hazardous waste and hazardous substances:

> Information is knowledge and knowledge is power. By authorizing the agency to mount inspections and to collect information from persons and entities involved with hazardous residues, §

> 6927(a) [of RCRA] directly facilitates the government's ability to battle the polluters and the despoilers * * *. Put another way, unless the civil penalty provisions of RCRA is applicable to those who refuse to honor the EPA's inquisitional authority under § 6927(a), the agency will be severly -- indeed, unduly -- handicapped in its attempt to effectuate needed regulation of the "treatment, storage, transportation and disposal of hazardous wastes which have adverse effects on health and the environment." 42 U.S.C. § 6902(4).

Consequently, courts have sustained imposition of substantial civil penalties to enforce the federal environmental laws. Sierra Club v. Simkins Industires, 847 F.2d.

A. Those findings were basically recommendations for EPA to determine what additional action could be undertaken under the corrective action portion of the RCRA program.

Q. You indicated that when the Section 3013 order was issued, it called for a response in 30days which was based on the statute?

A. Yes.

Q. Does EPA ever grant extensions when an order of that nature is issued, does it of grant extensions when it receives requests to do so?

A. Yes.

Q. Routinely grants extensions, doesn't it?

A. I only worked on one other order of this nature. We did grant an extension there, yes.

Q. Just a couple of more questions Mr. Webb. In reference to Government Exhibit Number 1, you see in the lower right-hand corner it says NUS Corporation?

A. Yes.

Q. Do you know who or what NUS Corporation is?

A. It is an environmental consulting firm.

Q. Is that the company, if you know, that submitted the MIDC permit application to the Department of Environmental Resources for the hazardous waste disposal facilty?

A. I believe that is correct, yes.

Q. NUS Corporation also does work for the EPA, does it not?

A. Yes.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MUNICIPAL & INDUSTRIAL DISPOSAL COMPANY, Plaintiff	)	
vs.	)	Civil Action No. 88-2631
WILLIAM K. REILLY, in his official capacity as Administrator of the United States Environmental Protection Agency, and the UNITED STATES ENVIRONMENTAL AGENCY, Defendants.	)	Judge Alan N. Bloch Magistrate Judge Ila Jeanne Sensenich
THE UNITED STATES OF AMERICA, Counterclaim Plaintiff	)	
VS.	)	
WILLIAM FIORE, d/b/a Municipal & Industrial Disposal Company, Counterclaim Defendant	)	

NOTICE OF APPEAL

Notice is hereby given that Municipal and Industrial Disposal Company, Plaintiff above named, and William Firoe, d/b/a Municipal and Industrial Disposal Company, Counterclaim Defendant above named, hereby

appeal to the United States Court of Appeals for the Third Circuit from a final judgment dated August 20, 1992 which was entered on the docket in this action on August 21, 1992.

Date: October 16, 1992

/s/ William Fiore
Municipal Industrial Disposal Company and William Fiore d/b/a Municipal Industrial Disposal Company, pro se.

EXHIBIT "K"

FEE PAID

FEB-6-81 00004 1st H Csh 2.25

'81 FEB 6 AM 8:30 GD81-03134

PROTHONOTARY
ALLEGHENY COUNTY

REV.-139 (3-79)

COURT OF COMMON PLEAS OF Allegheny COUNTY, PENNSYLVANIA
89-09117-2 JC 8101-0098

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF REVENUE

VS:

William Fiore
T/A Fiore Trucking & Contracting
607 Miller Ave.
Clairton, PA 15025

TO THE PROTHONOTARY OF SAID COURT:
Pursuant to the laws of the Commonwealth of Pennsylvania, there is herewith transmitted a Certified Copy of a Lien to be entered of record in your County.

CERTIFIED COPY OF LIEN

BY: BUREAU OF ACCOUNTS SETTLEMENT
POST OFFICE BOX 2055
HARRISBURG, PENNSYLVANIA 17105

CLASS OF TAX 1	TAX PERIOD (OR DUE DATE) 2	DATE OF ASSESSMENT DETERMINATION OR SETTLEMENT 3	IDENTIFYING NUMBER 4	TAX 5	TOTAL 6
S & U	01-01-75 09-30-78	12-29-78	A-83530	$ 216,741.26	$ 292,419.24

EXHIBIT "L"

0706 8119

44 11 10.00
000000 05-07-86

COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
89-09117-2

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF REVENUE

VS:

JC 8604-0086

Fiore, William M.
T/A Fiore Trucking & Contra
607 Miller Avenue
Clairton, PA 15025

TO THE PROTHONOTARY OF SAID COURT:
Pursuant to the laws of the Commonwealth of Pennsylvania, there is herewith transmitted a Certified Copy of a Lien to be entered of record in your County

CERTIFIED COPY OF LIEN

BY: BUREAU OF ACCOUNTS SETTLEMENT
POST OFFICE BOX 8901
HARRISBURG, PENNSYLVANIA 17105-8901

CLASS OF TAX 1	TAX PERIOD (OR DUE DATE) 2	DATE OF ASSESSMENT DETERMINATION OR SETTLEMENT 3	IDENTIFYING NUMBER 4	TAX 5	TOTAL 6
S & U	01-01-82 12-31-84	11-06-85	A-23585	272,116.14	457,803.68
	01-01-75 09-30-78	12-29-78	A-83520	216,741.26	396,457.30

EXHIBIT "M"

GD90-20036

COURT OF COMMON PLEAS OF Allegheny COUNTY, PENNSYLVANIA

89-09117-2 JC 9011-9017

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF REVENUE

VS:

Fiore Trucking & Contracting
607 Miller Avenue
Clairton, PA 15025

TO THE PROTHONOTARY OF SAID COURT

Pursuant to the laws of the Commonwealth of Pennsylvania, there is herewith transmitted a Certified Copy of a Lien to be entered of record in your County.

CERTIFIED COPY OF LIEN

BY: BUREAU OF COMPLIANCE
DEPT. 280946
HARRISBURG, PA 17128-0946

CLASS OF TAX 1	TAX PERIOD (OR DUE DATE) 2	DATE OF ASSESSMENT DETERMINATION OR SETTLEMENT 3	IDENTIFYING NUMBER 4	TAX 5	TOTAL 6
S & U	10-01-78 10-31-81	04-16-85	AM-79275	$728,552.97	$1,590,045.29
	11-01-81 12-31-81	08-22-83	AM-79276	41,942.82	98,119.17
			TOTALS	$770,495.79	$1,688,164.46
			FILING FEES		10.00
			ADDITIONAL INTEREST		
			SETTLEMENT TOTAL		

INTEREST COMPUTATION DATE December 31, 1990

The undersigned, the Secretary of Revenue (or his authorized designee) of the Commonwealth of Pennsylvania, certifies this to be a true and correct copy of a lien against the above-named taxpayer for unpaid tax, interest, additions or penalties thereon due from such taxpayer and which, after demand for payment thereof, remains unpaid. This amount of such unpaid tax, interest, additions or penalties is a lien in favor of the Commonwealth of Pennsylvania upon the taxpayer's property, real, personal, or both, as the case may be.

SECRETARY OF REVENUE (OR AUTHORIZED DESIGNEE) — DATE

A-70

PART 1 - TO BE RETAINED BY RECORDING OFFICE

E COPY

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

TOWNSHIP OF ELIZABETH, Plaintiff	)	CIVIL DIVISION
vs	)	No. GD92 11492
WILLIAM FIORE, t/d/b/a Municipal and Industrial Disposal Company, Defendant.	)	Issue No: CODE: 130 MUNICIPAL CLAIM

Filed on behalf of:
Plaintiff

Counsel of Record
for this Party:

Timothy P. O'Reilly,
Esquire
PA I.D. #10798

1805 Law & Finance
Building
Pittsburgh, PA
15219
(412) 566-1717

MUNICIPAL CLAIM

MUNICIPAL CLAIM

The Township of Elizabeth, a first class township and a municipal corporation of Allegheny County, Pennsylvania, hereby files its claim and lien for ONE MILLION FIVE HUNDRED THIRTY-NINE THOUSAND THREE HUNDRED SIXTY and 00/100 ($1,539,360.00) DOLLARS, plus a 10% per centum fee for collection to Plaintiff's attorney, and costs allowed by law, against the lot of ground belonging to the said Defendant and sets forth the following:

1. The name of the Plaintiff by which the claim is filed is the Township of Elizabeth with offices at 522 Rock Run Road, Buena Vista, Pa 15018.

2. The name of the owner of the property and the Defendant herein against whom the claim is filed is William Fiore, t/d/b/a Municipal and Industrial Disposal Company who present address is Western Pennsylvania State Correcrtional Facility, AJ-0583, P.O. Box 99901, Pittsburgh, PA 15233

3. A description of the property against which the claim is filed is as follows:

539.701 Acres Henderson Road
Lot & Block 997-H-79

4. The authority under and by virtue of which the claim is imposed is Ordinance 481 of said Township of Elizabeth, duly ordained and enacted, pursuant to the Pennsylvania Local Tax Enabling Act, 53. P.S., Section 6901 et seq., and duly recorded in the Code of the Township of elizabeth, Pennsylvania, in compliance with the Act of General Assembly in such cases made and provided, which imposes a 10% gross receipts tax upon operators of land fills within the Township. Defendant herein operated such a landfill in the Township of Elizabeth and is subject to the tax.

5. This claim is imposed for gross receipts taxes due and unpaid by Defendant for the period September 30, 1979, through December 31, 1984. Said tax is imposed on the landfill operated by Defendant during the aforesaid time period.

6. The sum of ONE MILLION FIVE HUNDRED THIRTY-NINE THOUSAND THREE HUNDRED SIXTY AND 00/100 ($1,539,360.00) DOLLARS is the amount of the municipal claim due by Defendant for operation of the land fill at the abvoe site, for the period specified.

7. The Township of Elizabeth files this claim and lien under and by virtue of the acts of Assembly of the said Commonwealth of Pennsylvania relating thereto and the code of the said Township of Eliazabeth as aforesaid.

Respectfully submitted,

/S/ Timothy P. O' Reilly

Timothy P. O'Reily, Esquire
for the Township of South Fayette

GD92 11492
Filed: June 29, 1992, 1:11PM

CERTIFIED COPY FROM THE RECORD

MICHAEL F. COYNE, PROTHONOTARY

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JUL 20 1994
OFFICE OF THE CLERK

No. 93-1892

In the Supreme Court of the United States

OCTOBER TERM, 1994

WILLIAM FIORE, D/B/A MUNICIPAL AND INDUSTRIAL DISPOSAL COMPANY, PETITIONER

v.

CAROL M. BROWNER, IN HER OFFICIAL CAPACITY AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the district court abused its discretion in imposing a civil penalty of $2,000 for each day of petitioner's noncompliance with an administrative order issued by the Environmental Protection Agency, requiring petitioner to determine whether hazardous wastes from his landfill had contaminated the nearby soil, surface water, or groundwater.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The unreported memorandum opinion of the court of appeals, which is not reproduced in the appendix to the petition for certiorari, is attached as an appendix to this brief (App., *infra*, 1a-4a). The judgment of affirmance of the court of appeals (Pet. App. A28-A29) is noted at 16 F.3d 404 (Table). The opinions of the district court (Pet. App. A51-A54) and the United States Magistrate Judge (Pet. App. A30-A50) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1993. The petition for a writ of certiorari was filed on March 4, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In this case, the United States Environmental Protection Agency (EPA) ordered petitioner to determine whether hazardous wastes from his landfill, adjacent to the Youghiogheny River, had contaminated the nearby soil, surface water, or groundwater. Pet. App. A35. The district court imposed a civil penalty of $2,000 for each day of petitioner's 240 days of non-compliance with that administrative order. Pet. App. A54. The court of appeals affirmed. App., *infra*, 1a-4a; Pet. App. A28-A29.

1. The Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.* (RCRA), is a comprehensive environmental statute under which the Administrator of the EPA is granted broad authority to regulate solid and hazardous wastes. Subtitle C of RCRA, 42 U.S.C. 6921-6939, establishes "a 'cradle-to-grave' regulatory structure overseeing the safe treatment, storage and disposal of hazardous waste," *United Technologies Corp.* v. *EPA*, 821 F.2d 714, 716 (D.C. Cir. 1987), including requirements governing the conduct of generators and transporters of hazardous waste, and of owners and operators of treatment, storage, and disposal facilities.

Section 2002(a) of RCRA confers on the Administrator broad powers to regulate the storage, treatment, transportation, and disposal of potentially hazardous wastes. 42 U.S.C. 6912(a). Section 3004 empowers the Administrator to "promulgate regulations establishing such performance standards, applicable to owners and

operators of facilities for the treatment, storage, or disposal of hazardous waste identified or listed under [Subtitle C], as may be necessary to protect human health and the environment." 42 U.S.C. 6924(a). Regulations promulgated by the Administrator include, among other things, the requirement that owners and operators of hazardous waste facilities must monitor levels of potential contaminants that may leach into the groundwater and must report certain groundwater data to the Administrator. See 40 C.F.R. 265.90-265.94 (interim status standards).

Section 3006 of RCRA, 42 U.S.C. 6926, also empowers the Administrator to approve state hazardous waste programs, to be administered and enforced in lieu of the federal program by States that have satisfied certain qualifying criteria. See 42 U.S.C. 6926(b). Such state programs are enforceable by both state and federal officers. See Section 3008(a) and (g); 42 U.S.C. 6928(a) and (g). On May 26, 1981, the Administrator granted interim approval, pursuant to Section 3006, to Pennsylvania's hazardous waste program at issue in this case, and on January 15, 1986, that program received final federal approval. 50 Fed. Reg. 46,734 (1985); 51 Fed. Reg. 1791 (1986). Like the parallel provisions of the federal program, Pennsylvania's hazardous waste regulations required owners and operators of hazardous waste facilities to monitor and report on groundwater conditions. See 25 Pa. Code § 75.265(n) (1986).

If the Administrator determines that any person has violated Subtitle C or its implementing regulations, she may issue an order, under Section 3008 of RCRA, assessing civil penalties for such violations and requiring compliance with any such provision. 42 U.S.C. 6928(a)(1). A violator that fails to comply with the order may be further liable for civil penalties of up to $25,000

per day. 42 U.S.C. 6928(c). Alternatively, whenever the Administrator determines that a person has violated any provision of Subtitle C or its implementing regulations, she may file suit in district court, seeking injunctive relief, penalties of up to $25,000 per day per violation, or both. Section 3008(a)(1) and (g), 42 U.S.C. 6928(a)(1) and (g).

Whenever the presence of hazardous wastes at a facility or their release from the facility may present a substantial hazard to human health or the environment, Section 3013(a) of RCRA, 42 U.S.C. 6934(a), empowers the Administrator to require the owner or operator of that hazardous waste facility to conduct whatever testing, monitoring, or other analysis is reasonably necessary to determine the nature and extent of the release. Section 3013(c) requires the recipient of such order to submit within thirty days a proposal for carrying out the monitoring, testing, and analysis mandated by EPA. The Administrator may also require the owner/operator to undertake the monitoring, testing, and analysis as proposed, or in accordance with modifications authorized by EPA. 42 U.S.C. 6934(c). If the recipient of a Section 3013 order fails or refuses to comply with the order, Section 3013(e) of RCRA, 42 U.S.C. 6934(e), authorizes the Administrator to commence a civil enforcement action in district court. The district courts have jurisdiction to require compliance with the Administrator's orders under Section 3013, and to assess a civil penalty of up to $5,000 per day for failure or refusal to comply with such orders. 42 U.S.C. 6934(e).

2. a. Petitioner William Fiore, doing business as Municipal and Industrial Disposal Company (MIDC), owned and operated a solid waste disposal facility located at Buena Vista, Pennsylvania. The facility is bounded on the south and east by the Youghiogheny River, and is

located in an area that has been heavily strip-mined. A trailer park is located near petitioner's landfill, and the water intake for the city of McKeesport, which uses the river as a source of its drinking water, is located eight miles downriver. C.A. Supp. App. 53, 59.

On December 16, 1982, MIDC submitted a RCRA permit application to EPA. The application identified certain hazardous wastes as being treated, stored, or disposed of at the facility. The primary hazardous waste disposed of at the facility was decanter tank car sludge. C.A. Supp. App. 1-6.

After a series of proceedings initiated against petitioner by the Pennsylvania Department of Environmental Resources revealed unpermitted discharges into a tributary of the Youghiogheny River, EPA filed an administrative complaint against petitioner, pursuant to Section 3008(a) of RCRA, alleging that MIDC had failed to develop an adequate groundwater sampling and analysis plan and had failed to implement groundwater monitoring, as required by 25 Pa. Code § 75.265(n)(7)-(9) (1986), which was then part of Pennsylvania's federally approved hazardous waste program. C.A. Supp. App. 30-31. An Administrative Law Judge (ALJ) found that MIDC had violated 25 Pa. Code § 75.265(n)(8) and (9) (1986), by failing to perform even one quarter of the groundwater monitoring which was required. C.A. Supp. App. 35-36. For this, the ALJ imposed a nonrecurring penalty of $25,250 against MIDC, and ordered MIDC to undertake groundwater monitoring. *Id.* at 29, 37. The Chief Judicial Officer of EPA affirmed the ALJ's decision on appeal on November 1, 1988. *Id.* at 42-51.

EPA also issued an order, on March 11, 1987, to MIDC under Section 3013(a) of RCRA, requiring MIDC to submit a written proposal of the sampling, analysis, monitoring, and reporting of data relating to hazardous

wastes at its site. C.A. Supp. App. 60. The Section 3013 order was based on information that the presence of hazardous waste, or the release of such waste from MIDC's facility, might present a substantial hazard to human health and the environment. *Id.* at 52-66. Petitioner never submitted a comprehensive proposal to study the hazardous waste landfill.

On May 29, 1987 (approximately one and one-half months after MIDC's response to the Section 3013 order was due), James Webb of the RCRA Enforcement Section, Hazardous Waste Management Division of Region III of EPA, had a telephone conversation with a consultant to petitioner. The consultant told Webb that he was sending Webb a report or proposal. The report subsequently received by Webb did not provide any information about the surface water, soil, or groundwater sampling. C.A. App. 2, 13-15, 213.

On June 30, 1987, Webb informed petitioner's consultant that the proposal did not meet the requirements of the Section 3013 order. C.A. App. 213. In response to an August 7, 1987, letter from petitioner's consultant, EPA again informed MIDC that the proposal submitted by MIDC's engineers did not meet the requirements of the Section 3013 order. C.A. App. 18.

In September, 1987, EPA sent to petitioner's consultant a partial copy of a report by an EPA contractor, showing where samples had been taken at the facility. EPA also mailed a letter and part of the contractor's report on the MIDC landfill to petitioner. C.A. App. 21-22. In response, counsel for petitioner informed EPA by letter that petitioner was not prepared to submit a proposed plan until he had had the opportunity to review the entire investigative report compiled by EPA's contractor. By telephone, Webb informed petitioner's counsel that, since the contractor's

RCRA ,Facility Assessment report was based on information obtained from petitioner, petitioner did not need to review the entire report to prepare the proposed work plan required by the Section 3013 order. *Id.* at 22-23. Finally, by letter dated December 14, 1987, EPA informed counsel for petitioner that EPA would no longer look to petitioner to submit and implement the proposal ordered pursuant to the March 11, 1987, Section 3013 order. *Id.* at 214.

b. On December 1, 1988, the date that the penalty for the violation of Section 3008 of RCRA became due (see p. 5, *supra*), MIDC brought the present action against EPA by filing a complaint in district court. The complaint alleged that EPA's November 1, 1988, decision imposing penalties on MIDC was arbitrary and capricious and contrary to law, and sought to have the penalties vacated. C.A. Supp. App. 67-70.

EPA answered the complaint and filed a three-count counterclaim. C.A. Supp. App. 71-83. In the first claim, EPA sought a civil penalty of $25,000 for each day that MIDC had failed to pay the $25,250 in penalties imposed by the ALJ on the administrative complaint. *Id.* at 78-79. This claim was based on Section 3008(c) and (g) of RCRA. In the second claim, EPA sought payment of the administrative penalties imposed under Section 3008, plus interest. C.A. Supp. App. 79-80. In the third claim, brought under Section 3013(e), EPA sought a civil penalty of $5,000 for each day of MIDC's noncompliance with the Section 3013 order. C.A. Supp. App. 80. The district court granted the United States' motion for summary judgment on all three counterclaims. *Id.* at 102-103.

c. Petitioner asserted that he was unable to pay any penalty. The magistrate held a hearing on the penalty issue on July 9, 1992. See C.A. App. 1-178. At the

hearing, the government reviewed the history of the proceedings relating to petitioner's facility and introduced evidence showing that, by not complying with the Section 3013 order, petitioner had reaped an economic benefit of $212,000. C.A. App. 85. An EPA investigator also testified that petitioner had the ability to pay at least $800,000. *Id.* 86-87, 216. Petitioner did not testify at the hearing, and, except for introducing evidence relating to liens on his properties, petitioner failed to present any evidence to rebut the government's testimony. *Id.* at 216.

The magistrate credited the evidence introduced by the government and, in proposed findings of fact and conclusions of law, recommended that the district court impose a penalty of $2,000 per day of noncompliance, which, the magistrate specifically noted, "would be sufficiently punitive without being excessive." Pet. App. A48-A49. Petitioner objected to that recommendation, contending "that a penalty of no more than $1,000.00 per day would be appropriate under the circumstances, which amount would serve as a deterrent and would sufficiently punish [petitioner] without being overly punitive." C.A. App. 230-231. The district court entered an order adopting as its opinion the proposed findings of fact, conclusions of law, and recommendation for disposition of the magistrate judge. Pet. App. A51-A54.

d. The court of appeals affirmed in an unpublished decision (App., *infra*, 1a-4a). After reviewing the five factors identified in *United States* v. *Reader's Digest Association*, 662 F.2d 955, 967 (3d Cir. 1981), cert. denied, 455 U.S. 908 (1982), to be considered by the district courts in assessing civil penalties,* the court noted

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* These factors are "(1) the good or bad faith of the defendants; (2) the injury to the public; (3) the defendant's ability

(App., *infra*, 3a) that petitioner relied on the third factor, contending that the district court had erred by not adequately considering his ability to pay the penalty. The court found this contention to be without merit. *Ibid.* The court of appeals noted that the EPA investigator had testified that, by not complying with the agency's order, petitioner had reaped an economic benefit of $212,000, and that petitioner had the ability to pay at least $800,000. *Ibid.* The court also noted that petitioner had presented no evidence whatsoever of his assets or ability to pay, and, instead, his counsel had argued only that "[m]ost cases . . . have imposed a penalty in the range of about $1,000 a day." *Ibid.*

In disagreeing with petitioner's contention that the penalty recommended by the magistrate would be overly punitive, the court noted that the magistrate had found that petitioner had "discharged into the ground water serious hazardous waste constituents which, among other things, * * * can cause leukemia, anemia, retarded nervous system development in young children, behavioral problems, stillbirth, [and] miscarriages." App., *infra*, at 3a. The court also noted that the magistrate had found no evidence that petitioner made any good faith effort to cooperate. *Id.* at 4a. Finally, the court concluded that "the bad faith of the [petitioner] and the serious nature of the injury to the public are well-established by the evidence of record and the findings of the magistrate judge are well-supported." *Ibid.*

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to pay; (4) the desire to eliminate the benefits derived by a violation; and (5) the necessity of vindicating the authority of the [agency]." 662 F.2d at 967.

ARGUMENT

1. In his petition's question presented and conclusion, but not in the body of the petition, petitioner raises for the first time the contention that the penalty imposed on him by the district court violated the Fifth and Eighth Amendments. These constitutional questions were neither presented to the lower courts nor passed upon by them, and, accordingly, they have been waived. As a general rule, this Court will not review issues not raised or considered in the lower courts. See, *e.g.*, *Zobrest* v. *Catalina Foothills School Dist.*, 113 S. Ct. 2462, 2466 (1993); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Petitioner presents no reason for disregarding this rule in his case.

2. In any event, petitioner's assertions (Pet. 10) that the district court erred by allegedly ignoring the evidence of his inability to pay, and that this resulted in the trial court's imposing an "overly punitive" sanction, are without merit. As the court of appeals recognized in this case and in its previous decision in *Reader's Digest*, petitioner had the burden of establishing his inability to pay a civil penalty, and petitioner does not challenge the validity of the *Reader's Digest* test or contend that the Third Circuit's decision on that point conflicts with decisions of this Court or any other court of appeals. The government introduced evidence of the financial benefit that petitioner reaped, and uncontradicted evidence that he has unencumbered bank accounts and real property worth approximately $1.8 million (App. *infra*, 3a). Yet, as the court noted, petitioner presented no evidence whatsoever of his assets or ability to pay, relying instead on his counsel's argument that most cases have imposed a lesser penalty.

As for petitioner's contention that the penalty imposed by the district court was overly punitive, the Third Circuit correctly noted the extremely serious health hazards presented by the toxic constituents leaching from petitioner's landfill and petitioner's lack of good faith or cooperation with EPA. The court also noted (App., *infra*, 4a) that "the record [was] replete with evidence that [petitioner's] efforts were largely limited to frustrating the efforts of the EPA and that all the while his violations were creating an economic benefit to him which totalled in excess of $200,000." In addition, as the court of appeals observed, Section 3013(e) of RCRA authorizes the district courts to impose a penalty of up to $5,000 for each day of noncompliance, whereas, in this case, the district court imposed a penalty of only $2,000 per day. 42 U.S.C. 6934(e); App., *infra*, 4a. The court of appeals thus correctly held that the district court did not abuse its discretion by imposing a penalty of $2,000 for each day of noncompliance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
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Attorneys

JULY 1994

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 92-3636

MUNICIPAL & INDUSTRIAL DISPOSAL COMPANY

v.

CAROL M. BROWNER,* IN HER OFFICIAL CAPACITY AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

MUNICIPAL AND INDUSTRIAL DISPOSAL COMPANY, WILLIAM FIORE, D/B/A MUNICIPAL AND INDUSTRIAL DISPOSAL COMPANY,* APPELLANTS

* (Pursuant to Rule 12(a), F.R.A.P.)

* (Pursuant to Rule 43(c), F.R.A.P.)

On APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 88-02631)
District Judge: Hon. Alan N. Bloch

Submitted Under Third Circuit LAR 34.1(a)
on December 9, 1993

Before: BECKER and NYGAARD, Circuit Judges,
and YOHN, District Judge.*

[Filed Dec. 20, 1993]

MEMORANDUM OPINION

NYGAARD, Circuit Judge

Municipal & Industrial Disposal Company and William Fiore appeal a district court order which imposed a $2,000 per day penalty against them under section 3013 of the Resource Conservation and Recovery Act for 240 days of violations, resulting in a total penalty of $480,000. Appellants contend that the district court erred by failing to consider their ability to pay. We will affirm.

In *United States v. Readers Digest Association, Inc.*, 622 F.2d 955 (3d Cir. 1981), *cert. denied* 455 U.S. (1982), we identified five factors to be considered by the district court in assessing civil penalties:

(1) The good or bad faith of the defendant;

(2) The injury to the public;

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* Honorable William H. Yohn, Jr., United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

(3) The defendant's ability to pay;

(4) The desire to eliminate the benefits derived by a violation; and

(5) The necessity for vindicating the authority of the enforcing party.

On appeal, Fiore specifically argues the third of these factors and contends the district court erred by not adequately considering his ability to pay the penalty. We find the issue without merit.

Appellant bears the burden of establishing its financial ability to pay a civil penalty. At the penalty hearing, the government presented evidence from the EPA's civil investigator that by not complying with the agency's order, Fiore had reaped an economic benefit of $212,000. Moreover, the investigator for the EPA testified that Fiore had the ability to pay at least $800,000 and the uncontradicted evidence shows that Fiore has unencumbered bank accounts and real property worth approximately $1.8 million. Yet, on the face of this evidence against him, Mr. Fiore presented no evidence whatsoever of his assets or ability to pay. Instead, counsel for the appellants argue that "Most cases . . . have imposed a penalty in the range of about $1,000 a day."

Appellant next contends that the penalty recommended by the magistrate judge and adopted by the district court "would be overly punitive." We disagree. First, the magistrate judge found that the appellant had discharged into the ground water serious hazardous waste constituents which, among other things, are toxic to aquatic organisms, can cause leukemia, anemia, retarded nervous system development in young children, behavioral problems, stillbirth, miscarriages, and which can adversely

affect several organs of the body. Second, she found no evidence that he made any good faith effort to cooperate. Moreover, although Fiore entered into a consent order, he thereafter failed to comply with it. We conclude that the bad faith of the defendant and the serious nature of the injury to the public are well-established by the evidence of record and the findings of the magistrate judge are well-supported.

Finally, the record is replete with evidence that appellant's efforts were largely limited to frustrating the efforts of the EPA and that all the while his violations were creating an economic benefit to him which totalled in excess of $200,000. Hence, we find no error in the proposed findings and recommendation of the magistrate judge that a fine in this amount was necessary to eliminate the benefits appellant derived by his violation and to vindicate the authority of the EPA.

The maximum penalty which the administrative judge could have recommended, and the district court could have awarded pursuant to section 3103 of the Act is $5,000 per day. We see no error in the magistrate judge's recommendation that a $2,000 penalty would be appropriate. Accordingly, we see no error in the district court's decision to accept the recommendations of the magistrate judge, and we will affirm.